REPORTABLE

IN THE KWAZULU-NATAL HIGH COURT
DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.5551/10

In the matter between

ICEBREAKERS NO.83 (PTY) LIMITED Plaintiff

and

MEDICROSS HEALTH CARE
GROUP (PTY) LIMITED Defendant

J U D G M E N T

Del. 18 February 2011

WALLIS J.

[1] The plaintiff issued a simple summons against the defendant. It claimed payment of three amounts, namely R283 767.00 'arising out of arrear rental due in respect of leased premises'; R169 435.26 'being the reasonable and necessary costs of building alterations carried out' to those premises and R49 587.00 'in respect of the costs and repairs to dental equipment leased to the defendant'.

[2] The defendant gave notice of its intention to defend the action and delivered a notice of exception. It excepted to each of the three claims on the grounds that the claims as set out in the summons lacked averments to sustain a cause of action. The defendant's Johannesburg attorney signed the notice of exception but there was no indication that the attorney

enjoyed rights of appearance in the High Court. As an exception is a pleading[1] and therefore requires in terms of rule 18(1) to be signed by both an advocate and an attorney or by an attorney enjoying rights of appearance in the High Court it appeared that this document was defective.

[3] Whether to cure this defect or for some other reason, a further document headed 'Application in terms of Rule 23(1)' was thereafter delivered. In it the defendant said that it was noting an exception to 'the plaintiff's summons and Particulars of Claim'. That, of course, it could not do as the action had been commenced by way of a simple summons issued in terms of Rule 17(2)(b) in accordance with Form 9 of the First Schedule and no particulars of claim were annexed thereto or were required. The basis of the exceptions was the same as before save for the addition of the following:

'**KINDLY TAKE NOTICE FURTHER THAT** a Notice of Exception in Terms of Rule 23(1) was delivered on 26 June 2010 wherein the Plaintiff was given the opportunity of removing the cause of complaint aforementioned and the Plaintiff has failed to do so.'

It appears that this was an attempt to broaden the scope of the exception to advance a contention that the summons was vague and embarrassing, as well as lacking averments necessary to sustain an action. However, the previous document was clearly not a notice affording the plaintiff an opportunity to remove the cause of any complaint that its summons was vague and embarrassing. In the event the exceptions were argued on the original basis. An attorney with a right of appearance in the High Court signed this second notice.

[4] Mr Pistorius, who appeared for the plaintiff, contended that it is

1 *Haarhoff v Wakefield* 1955 (2) SA 425 (E).

impermissible to take an exception to a claim set out in a simple summons and that the exception should be dismissed on this ground alone. Mr Sieberhagen, on behalf of the excipient, contended that a summons is a pleading and in terms of Rule 23(1) it is therefore susceptible to an exception being taken. He accepted that there is no authority precisely in point that supports this contention but relied upon *dicta* in two cases that suggested that where the defendant's complaint goes to the substance of the claims made against it and not to an irregularity of form in the summons the proper remedy is an exception. At the outset therefore the question to be decided is whether a simple summons is a pleading to which an exception can be taken.

[5] When the question is couched in that form one is immediately struck by the fact that, if the defendant's contention is correct, an exception can successfully be taken to a simple summons even though the summons complies in all respects with the rules of court. This is so because a simple summons in terms of the rules must be in a form as near as may be in accordance with Form 9 in the First Schedule to the Rules. The form only requires in regard to setting out the cause of action that it be set out in concise terms. There is a plethora of authority, of which I need mention only the judgment of Schreiner JA in *Trans-African Insurance Co. Limited v Maluleka.*[2]*,* that all that is required in setting out the concise terms of one's cause of action is to give a general indication of the claim amounting merely to a label. In the result the claim may be utterly vague, such as the one Schreiner JA instanced, of a claim for £100 000 'as damages for breach of contract'. In *Maluleka's* case itself the decision was based on an assumption that the summons was defective and did not

2 1956 (2) SA 273 (A). The judgment remains good law even though it was delivered prior to the introduction of the Uniform Rules of Court. *Standard Bank of SA Limited v Oneanate Investments (Pty) Limited (in liquidation* 1998 (1) SA 811 (SCA) at 825 D-E.

disclose a cause of action. Nonetheless the appellant's claim to have the summons cancelled was rejected, leave was granted to amend and it was held that the summons was adequate to interrupt prescription.

[6] As that is all that is required of a plaintiff issuing a simple summons to recover a debt or liquidated demand, it would be incongruous were a defendant able to take exception to the summons. In terms of Rule 23(1) the only grounds for an exception are that the pleading is vague and embarrassing or that it lacks averments necessary to sustain an action. Yet in accordance with our authorities a simple summons may be perfectly valid even though the cause of action is stated vaguely or is defective. The contention that an exception can be taken to a simple summons is therefore inconsistent with the nature of such a summons and the requirements of the rules in regard to its contents.

[7] That analysis suggests that a summons is not a pleading. This is reinforced by having regard to the provisions of Rule 18 relating to pleading generally. In terms of Rule 18(3) every pleading has to be divided into paragraphs, which are to be consecutively numbered and as near as possible each containing a distinct averment. That does not harmonise with the contents of a simple summons set out in form 9. Those contents are consistent with the definition of a summons as merely: 'A citation issued by a competent court commanding the person to whom it is directed … to appear before such court within a certain period or on a certain day to answer the claim of some other person …'[3]

[8] Rule 18(3) is inconsistent with the requirements for a simple summons. Its provisions are, however, characteristic of a pleading as

3 Claassen's Dictionary of Legal Words and Phrases Vol.4 *sv* 'summons'.

explained by Galgut J[4] as a document containing distinct averments or denials of averments. That learned judge regarded Rule 18(3) as being the nearest to a definition of 'pleading' that can be found in the Uniform Rules.

[9] Rule 18(4) is, if anything, even more destructive of the defendant's contentions. It provides that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for the claim, with sufficient particularity, to enable the opposite party to reply thereto. Firstly that is wholly inconsistent with the proposition that the cause of action in a simple summons is merely a label. Secondly a party receiving a simple summons does not reply to the summons, but awaits service of a declaration to which the defendant responds by way of plea. It follows plainly that a simple summons does not have to comply with Rule 18(4). The logical inference to be drawn from the fact that it does not need to comply with the fundamental rules governing pleadings is that this is so because it is not a pleading. That is consistent with the views of the authors of *Herbstein and Van Winsen* who say that a simple summons is not a pleading.[5]

[10] The summons serves the function of commencing the litigation and bringing the defendant before the court. The pleading, whether by way of particulars of claim or declaration, contains the statement of the case. An exception is directed at the pleading not the summons. That was the case under the rules applicable before the introduction of the Uniform Rules of Court and the Uniform Rules do not operate to transform a summons into

4 In *Ex parte Vally: In re Bhoolay v Netherlands Insurance Co of SA Limited and Another* 1972 (1) SA 184 (W) at 185 (F).
5 A.C Cilliers, C Loots and H. C Nel, *Herbstein and Van Winsen: The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa (*5th Ed) Vol. 1 p.558.

a pleading.[6] It is true that rule 18(1), in dealing with the documents that require to be signed by both an advocate and an attorney or by an attorney having the right of appearance in the High Court, commences with the words:

"A combined summons, and every other pleading except a summons …'

but I do not think this alters the conclusion. The rule was clearly drafted in this way solely to make it clear that a simple summons did not need to be signed by anyone other than an attorney. It was not intended to convey that a summons is a pleading.

[11] Mr Sieberhagen relied principally upon the judgment of Sutton JP in *Singh v Vorkel*.[7] That was an appeal against an order holding that a summons was irregular because it did not set out a cause of action. Under the relevant Cape rule (which applied to illiquid claims) the summons had to state 'in concise terms generally' the plaintiff's cause of action. Sutton JP held that it was not necessary for the summons to set out a complete cause of action but only to indicate the claim in the most general terms. The appeal was upheld on the basis that the summons did disclose a cause of action. However the learned Judge President added the following remarks[8]:

'As much as I have come to the conclusion that the summons does disclose a cause of action, it is not necessary to consider whether, if it does not disclose a cause of action, that is an irregular or an improper proceeding …

In a number of the Transvaal cases to which I have referred and in Natal … it was decided that if a summons did not disclose a cause of action, that was an irregularity and summonses, which in the opinion of the Court did not disclose a cause of action, were set aside.

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6 *Group 5 Building Limited v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1991 (3) SA 787 (T) at 791 B-I. The decision in the subsequent appeal did not affect this reasoning.

7 1947 (3) SA 400 (C).

8 At p.406.

In the Transvaal cases the point does not appear to have been specifically raised as it has been in the present case, nor was argument directed to it, and the Courts appear to have assumed that it was an irregularity. It is not necessary to come to a decision on this question. That is a matter which may well be left over for future decision. I incline, however, to the view that if the summons does not disclose a cause of action that is not an irregular or improper proceeding within the purview of Rule 33. It seems to me that the Rule applies only to irregularities of form and not to matters of substance.'

The learned Judge President then referred to an unreported decision in 1906 where a summons claimed 'damages for libel' without stating the amount of the damages and before pleading to the declaration an exception was taken to the summons. The exception was allowed and the plaintiff was permitted to amend the summons by inserting an amount by way of damages. He then remarked apropos of this decision that:

'It may be that the proper remedy is by way of exception as in the case referred to, and not by application under Rule 33.'

[12] The possibility of taking an exception to a simple summons has not been pursued in any subsequent case.[9] It is not apparent what arguments were addressed to the court, nor whether it gave consideration to the point that a simple summons is not a pleading and therefore not susceptible of being attacked by way of exception.[10] In the circumstances the *dictum* relied on by counsel does not in my view outweigh the considerations I have dealt with that indicate that a simple summons is not a pleading and accordingly cannot be attacked by way of an exception. It is unnecessary for me to consider whether it can be attacked as an irregular proceeding under Rule 30 as that is not the course that the defendant has adopted.

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9 In *Dowson & Dobson Industrial Limited v Van der Werf and Others* 1981 (4) SA 417 (C) at 423 A Marais AJ refrained from entering into the issue.

10 The authors of the leading textbook on the Cape Rules at the time, Arehold and Fisher, *Rules of Court* (2nd ed by M Barnett, 1949) 46, simply say that: 'There is no provision in the rules for excepting to a Summons' As they had been part of the committee that drafted the rules under the chairmanship of Centlivres J it seems likely that this is a correct reflection of the position in the Cape at that time. The judgment in *Singh v Vorkel* is referred to in the book but on other points.

[13] For those reasons the exceptions must be dismissed. It is perhaps appropriate to mention in passing that in my view the concise statement of the plaintiff's claims in the summons complies with the requirements of Form 9 and Mr Sieberhagen did not suggest otherwise.

[14] Accordingly the exceptions are dismissed with costs.

M J D WALLIS

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